No. 83-990

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

THE SCHOOL DISTRICT OF THE
CITY OF GRAND RAPIDS, et al.,

Petitioners,

vs.

PHYLLIS BALL, et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., AND THE AMERICAN JEWISH COMMITTEE AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Did the court below err in its holding that the policy of sending public school teachers to teach secular subjects in nonpublic schools which are operated and controlled by religious organizations violates the establishment clause of the First Amendment?

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Pursuant to Rule 36.2 of the Rules of this Court, the organizations named above file this brief in support of Respondents. Consent for the filing of

this brief has been obtained in writing from the attorneys of record for the parties in this case. Their original letters have been filed with the Clerk of this Court.

INTEREST OF THE AMICI CURIAE

The Baptist Joint Committee on Public Affairs consists of representatives elected by each of eight cooperating Baptist conventions in the United States: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention. These Baptist groups have nearly 30 million members and reflect the traditional

Baptist concern for proper church-state relations. The Baptist Joint Committee has as one of its mandates the obligation to respond ". . . whenever Baptist principles are involved in, or are jeopardized through, governmental action. . . ." Among Baptists, religious liberty is a fundamental and sacred principle. We believe that the principle of religious liberty as it is embodied in the First Amendment to the Constitution of the United States is at risk in the case at bar.

The National Council of the Churches of Christ in the United States of America is a federation of thirty-three Protestant and Eastern Orthodox religious bodies in the United States with aggregate membership totaling approximately 43,000,000. It is governed by a General Board of 250 members chosen by the member denominations in proportion to their size

and support. The General Board determines the policies of the organization through debate, amendment and adoption of carefully-prepared statements and resolutions brought to it by its subordinate program divisions. Several of these policies affirm the principle of religious liberty, and it is on the basis of these policies that we enter this case.

Both the Baptist Joint Committee and the National Council of Churches played an active role in working out the compromises which made passage of the Elementary and Secondary Education Act of 1964 possible. Those compromises were designed to prevent government actions like those in Grand Rapids. Therefore, these amici are compelled by conscience to file this brief.

The American Jewish Committee, a national organization of approximately 50,000 members, was founded in 1906 to

protect the civil and religious rights of Jews. It is the conviction of this organization that the civil and religious rights of Jews will be secure only when the civil and religious rights of Americans of all faiths are equally secure. To fulfill this aspiration, we strongly support the constitutional principle of separation of religion and government. This principle has been the cornerstone of religious liberty in America and, historically, has proven to be of inestimable value to citizens of all faiths and of none. Accordingly, we believe that it is not a proper function of government to subsidize, whether directly or indirectly, any schools whose chief reason for being is to propagate a religious faith. This is why we join in the submission of this brief.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Amici adopt the statement of the case set forth in the brief for Respondents filed with this Court. The issues of fact have generally been agreed to by the parties. Only the issue of the constitutionality of the policy of the Grand Rapids Public Schools (GRPS) of sending teachers hired by GRPS and paid with public funds into nonpublic schools which are overwhelmingly sectarian to teach secular subjects and the issue of standing need to be resolved.

Amici have competencies in First Amendment issues as they relate to religious liberty and the separation of church and state. While it is our firm belief that the courts below were correct in their determination that Respondents had demonstrated standing according to Flast v. Cohen, 392 U.S. 83 (1968), and Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982), we do not assert special insights on this issue which would be of assistance to this Court. Hence, we will not advance arguments on the issue of standing.

SUMMARY OF ARGUMENT

When the instant case was before the courts below, 546 F.Supp. 1071, 718 F.2d 1389, the issue of standing was settled quickly and the bulk of the courts'

analysis centered on the establishment clause tests developed by this Court and clearly stated in Lemon v. Kurtzman, 403 U.S. 602, 612, 613 (1971):

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion." (citations omitted).

Amici argue herein simply that the policy adopted by GRPS to use public funds to pay salaries of teachers to teach secular subjects -- both "Shared Time" and "Community Education" courses -- in nonpublic schools which are almost exclusively religious in nature violates all three of the tests above and should be considered unconstitutional. Moreover, the child benefit theory is not applicable to this fact pattern.

ARGUMENT

In recent years revisionist historians have sought to challenge this Court's interpretation of the establishment clause of the First Amendment. Generally, these historians have been guilty of using a limited data base to arrive at a preconceived notion of what they wish the founders meant by the establishment clause. They assume that those who wrote and implemented the First Amendment did not really mean what they said about the reasons for and the scope of the Amendment. Specifically, they assert that the establishment clause was intended to prevent the establishment of, or favoring of, one religious belief over all others. Sound scholarship is of a different opinion. As Prof. Levy has pointed out, when the First Amendment was written and adopted there was a plural

establishment of religion in the country; and the prohibition was against aid to or support of any religion, not just against establishment of a single church. See, Levy, "School Prayers and the Founding Fathers," Commentary, Sept. 1962.

Justice Douglas, in a concurring opinion in Lemon, supra, at 628, stated that the analysis of constitutional objections to the expenditure of public funds for parochial schools would have to take into account

> the admitted and obvious fact that the raison d'etre of parochial schools is the propagation of a religious faith. They also teach secular subjects; but they came into existence in this country because Protestant groups were perverting the public schools by using them to propagate their faith. The Catholics naturally rebelled. If schools were to be used to propagate a particular creed or religion, then Catholic ideals should also be served. Hence the advent of parochial schools.

In large part as a result of the

decisions in Engel v. Vitale, 370 U.S. 421 (1962), and School District of Abington Township v. Schempp, 374 U.S. 203 (1963), an increasing number of Christian schools -- both church related and independent -- have been established to permit parents to choose an education for their children which involves oral group prayer, other religious exercises, and the teaching of as well as about religion.

The Orthodox Jewish community has traditionally provided a Hebrew Day School for its children. Other religious groups, e.g. the Black Muslims, have also begun to operate their own schools in order that their children may receive the kind of religious instruction the parents desire.

> The basic purpose of denominational education is to foster and maintain the teachings of a denominational religion. The religious aspect of the curriculum must be

> the principal and dominant reason for the existence of such schools. Essex v. Wolman, 342 F.Supp. 399, 419 (S.D. Ohio 1972), aff'd. 409 U.S. 808 (1972).

The point is that these schools have been established and operated -- usually on a financially sacrificial basis -- for religious reasons and for religious purposes. Any public programs which provide direct or indirect aid to religious schools, unless that aid is de minimis, must be given strict constitutional scrutiny.

1. The decision below correctly applies the primary effect and entanglement tests developed by this Court but inadequately deals with the secular purpose test.

This Court, in developing the three part establishment clause test -- secular purpose, principal or primary effect, and excessive entanglement -- has given the lower courts reliable guidance for deciding cases which deal with difficult and emotional controversies. In the instant

case, the lower court properly applied two of those tests to a fact pattern reflecting another attempt at public financing of selected programs in sectarian schools and arrived at the sound decision that the actions of GRPS were unconstitutional. Amici asert that the decision was constitutionally correct and could be faulted only in that it did not deal fully with the test for a secular purpose.

a. The Secular Purpose Test

Normally it is not easy to demonstrate that a legislative body which grants broad discretionary powers to develop educational programming for local school districts to local public school boards has anything but a secular purpose in so doing. However, when a local school district implements these broad discretionary powers by assigning teachers paid out of public funds to teach

classes in secular subjects in religious nonpublic schools, a secular purpose is difficult to discern.

We understand that, generally, legislative bodies -- whether Congress, a state legislature, or a school board -- make their own determinations on the constitutionality of their acts and that courts usually accept as a rebuttable presumption that they have acted with a secular purpose. However, in this case the presumption may be rebutted.

The law generally holds that when it is evident that specific results will flow from particular actions the person who undertakes those actions intends the results. A clear knowledge of the end result of an act makes the triggering action purposeful. Amici will discuss below the fact that the clearly foreseeable principal or primary effect of GRPS's action was the advancement of

religion. When that effect has been demonstrated, amici ask this Court to consider that the school board knew that the effect of its action in this case would be the advancement of religion and that, therefore, it had an unconstitutional purpose of advancing religion.

In their joint brief (PJB), Petitioners spend less than 13 lines, using argument by assertion, to conclude that "Clearly, the GRPS achieved its secular educational purposes." (PJB 23) Amici contend that the mere assertion that the GRPS exhibited "secular educational purposes" in their actions is not probative. Rather, amici contend that GRPS did not operate in a vacuum. Either it knew purposefully that public funds would be used to aid religious schools or it did not measure up to the duty of care required of directors of a multimillion dollar public operation. Simply, GRPS

acted to add faculty at public expense to religious nonpublic schools. The argument that they were public school teachers who remained public school teachers is without merit. Studies have shown that the type of relationship established by GRPS tends to convert public school teachers into parochial school teachers. La Noue, "Church-State Problems in New Jersey," 22 Rutgers L.Rev. 219 (Winter 1968). Amici believe that GRPS demonstrated the type of purpose forbidden by the establishment clause.

Whatever the motives of the GRPS might be, the purposes which it had in instituting the policy of spending public funds in parochial schools are invalid. "Good motives cannot save impermissible actions." Allen v. Morton, 495 F.2d 65, 72 (D.C.Cir. 1973).

b. The Primary Effect Test

The facts in this case reveal that

some 470 full-time and part-time teachers were employed to teach the Shared Time and Community Education courses in nonpublic schools in Grand Rapids. During the 1978-79 school year 9,494 nonpublic school children were enrolled in these courses and public funds totaling $1,397,577.20 were spent to teach them. By the 1981-82 school year more than 11,000 nonpublic school children were enrolled and more than double the amount of public funds was expended -- approximately $3,000,000. In addition to such core course supplements as physical education, industrial arts, music and art, courses such as remedial and enrichment mathematics and reading have been taught as part of the Shared Time program in nonpublic Grand Rapids schools. So too have highly desirable courses which enrich the college preparatory curriculum of the nonpublic school. Among Shared

Time courses offered were the following: Humanities, Language Arts, Home Economics, Science, Spanish, French, Latin, Business, Social Studies, Yearbook, Calculus, Creative Writing, Psychology, Journalism, Criminology, and Advanced Biology. None of these courses except physical education was required for graduation from or promotion in any nonpublic school, but all of them are courses which secondary schools must offer if they are to provide their students with a curriculum which prepares them for college admission.

By relieving religious schools of the substantial cost of offering necessary courses -- optional to the students but not really optional to the schools -- the primary effect of the GRPS policy is to advance religion. The religious schools are financially freed to offer religiously impregnated core courses, to teach

religion, and to provide facilities for religious education and religious exercises. The nonpublic schools which have participated in the program financed by GRPS -- 28 Roman Catholic schools, 7 Christian schools, 3 Lutheran schools, 1 Seventh Day Adventist school, and 1 Baptist school -- have been directly aided thereby in both their secular and their sectarian educational efforts. It is not children who have been aided per se. Children have been aided only incidentally in the process of enlarging the resources available to religious schools and, thereby, advancing religion.

The Court of Appeals for the Sixth Circuit (at Joint Petition for Writ of Certiorari, 35a, 36a) stated the conclusions at which it arrived after a careful examination of the record and the findings of the District Court:

First, the schools with whom

the School Board of Grand Rapids has contracted and in which these classes are taught are religious institutions created, controlled and operated (as, of course, they have a clear right to be) with the advancement of their various religious faiths as a primary purpose.

Second, the majority of the controlling boards, administrators and teachers in the schools are adherents to the particular school's religious mission, as are the great majority of the parents of the students and the students themselves.

Third, the program has increased to the point where it involves 10% of the classroom time of the schools concerned and a total tax expenditure of $6,000,000.

Fourth, a substantial number of the teachers employed in the Shared Time program were previously employed in the parochial school concerned, and a majority of teachers employed in the Community Education classes are teachers regularly employed in teaching in the religiously oriented program of the schools concerned.

Fifth, such supplementation of teachers' salaries is a direct benefit to all teachers in the two programs, and through them to the schools and to the religious mission of the schools concerned.

Sixth, the District Judge found, and we agree, that as to the three school systems concerned, "a substantial portion of the participating nonpublic schools' 'functions are subsumed in the religious mission...'" Hunt v. McNair, 413 U.S. 734, 743 (1973).

Amici agree with these conclusions and emphasize the point that the action by GRPS "is a direct benefit to all teachers in the two programs, and through them to the schools and to the religious mission of the schools concerned." Because the GRPS has given direct and substantial public fund benefits to religious schools and their religious mission, that action patently transgresses the requirement that state action not advance religion.

c. The Excessive Entanglement Test

The GRPS, in establishing Shared Time and Community Education programs which facially attempted to avoid an unconstitutional advancement of religion, estab-

lished programs which fail the excessive entanglement test. Petitioners point to the programs' six year record of operation which they claim shows that the programs existed without excessive entanglement. Amici assert that such a record could only result from one of two alternatives: (1) In order to know that there had been no excessive entanglement, a constant monitoring at an unconstitutional level was necessary to determine that the secular courses remained strictly secular, that the leased classrooms remained "desanctified," and that religious symbols -- including the wearing of school uniforms -- had not intruded to the degree that state approval or sponsorship of religion could be inferred by students, or (2) Monitoring was so nearly absent that there was a failure to determine properly that where public funds were spent religious and secular educa-

tion were kept scrupulously separated. Amici argue that not only the presence but also the absence of such monitoring creates constitutional problems for these programs.

In Lemon, supra, and DiCenso v. Robinson, 403 U.S. 602 (1971), cases dealing with aid to religious schools, it was held that the administrative rules established were such that the government was excessively entangled with religion. After that decision, Ohio's legislature passed a tuition reimbursement act under which a portion of tuition paid to religious schools was returned to parents who had children enrolled in those schools. No restrictions were set by the state to guarantee that the reimbursed tuition money would be spent for non-religious purposes. This lack of administrative control was held to be a defect by a three judge court in Essex,

supra at 416, which was affirmed by this Court:

> [T]he State retains a responsibility of insuring that the public moneys thus provided and which retain their public character throughout the transaction, are used for constitutionally permissible ends and continue to be so used.

In the instant case, if the kind of arrangement which GRPS had with the religious nonpublic schools failed to incorporate sufficient administrative controls to insure that public moneys were used for strictly secular purposes, that arrangement is defective under the establishment clause. "[A]ny general purpose aid, lacking non-entangling restrictions on use, constitutes almost per se violation of the Establishment Clause." Id., at 414, 415 fn. 20.

Of further importance is the matter of which this Court spoke in Lemon, supra, at 622:

> A broader base of entanglement

> of yet a different character is presented by the devisive political potential of these state programs.
>
> * * * * *
>
> Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process. (citations omitted)

The potential for divisiveness along religious lines is clear and present in the GRPS scheme in question in the case at bar. Approval by this Court of the GRPS scheme will mean that such programs will take on lives of their own and will generate political divisiveness along religious lines when further course offerings are sought and shares of a limited source of public funds are at issue between public schools and reli-

gious schools. Further, approval of this scheme would engender similar schemes all across the country. The ensuing controversies between the advocates of free, quality public education and those of nonpublic education which is permeated with religion would create divisiveness along religious lines the likes of which this country has not seen. The current anti-clericalism would be multiplied many fold.

Thus, it is amici's contention that the GRPS scheme, as measured by this Court's establishment tests, is constitutionally defective. Further, we contend that the fact pattern in this case makes it clearly distinguishable from Mueller v. Allen, 103 S.Ct. 3062 (1983). In Mueller the Court divided 5-4 in holding certain tax deductions for parents of all school children to be constitutional even

though a preponderance of the deductions went to parents of children in religious schools. The Court based its holding on the grounds that the tax deductions were generally beneficial to all parents and, more importantly, any aid went to parents of the children involved and not to the parochial schools themselves.

In the instant case, the aid went directly to the religious nonpublic school. This cannot be done without transgressing the strictures of the establishment clause. Further, it is not legally correct to argue that, because the Shared Time and Community Education courses were offered in both the public schools and the nonpublic religious schools, the benefits flowed to all children and, therefore, Mueller was controlling. In Mueller the tax deductions became available at the same time to all parents who qualified for those deduc-

tions. In the instant fact pattern, the courses in question had long been available in the public schools. The GRPS programs in question came into being in order to aid nonpublic religious schools. Because the GRPS scheme amounted to aid to schools, the unconstitutionality of that aid cannot be cured by drawing parallels between course offerings in public and nonpublic schools.

2. The decision below properly rejects the child benefit theory as it was applied to the fact pattern in the case at bar.

Petitioners' argument (PJB 30,31) that the GRPS's policy of paying for a part of the education of a child in a religious school is equivalent to the child benefit theory enunciated in Everson v. Board of Education, 330 U.S. 1 (1947), and Board of Education v. Allen, 392 U.S. 236 (1968) is specious. That is, as the Concise Oxford Dictionary

(7 ed. 1983) defines the word, it is "fair or right on the surface but not in reality."

Everson dealt with the permissibility of the state choosing to pay for transportation for children to attend church related schools. The emphasis was on the state's interest in protecting the safety, etc. of the children and the conclusion was that the aid went directly to the parents of the children who were the beneficiaries of the transportation. The aid did not go to the schools.

In Allen the Court held that the benefits of a state statute authorizing the purchase of textbooks which were then loaned to children in parochial schools inured to the children and their parents and not to the school.

As has been demonstrated and as the courts below held, the aid in question went directly to the religious schools in

the case at bar and the religious aims of those schools were advanced. Only as children were the recipients of the education available at the religious schools could an argument be made for a child benefit theory. In one sense, everything that happens in a school is a child benefit in that the children are the recipients of the offered education. However, such an interpretation of the child benefit theory makes it so broad it is meaningless and, if such an interpretation is allowed to be applied to religious schools, it makes the establishment clause a nullity.

Under the fact pattern of the instant case, children were obliged to go to a sectarian institution in order to obtain these public benefits. This made the sectarian institution the vehicle, conduit, channel, intermediary, and proprietor of public resources for the

benefit of those children, and of those only, who met its particular sectarian criteria for admission. In the process, these public resources became annexed to the parochial school, extending its institutional scope to the benefit of its religious sponsors. The children and their parents were aided only to the extent that nonpublic religious education became a bargain at public expense. This certainly cannot be admissible under this Court's explication of the establishment clause.

The child benefit theory may be described as good, desirable, and/or expedient in the abstract, but as this Court observed in Houchins v. KQED, Inc., 438 U.S. 1, 13 (1978), "We must not confuse what is 'good,' 'desirable,' or 'expedient' with what is constitutionally commanded by the First Amendment." To apply the child benefit theory to this

fact pattern runs contrary to the commands of the First Amendment.

CONCLUSIONS

Amici cling to their traditional firm support of the constitutional requirement of the separation of church and state. We believe that both church and state flourish best when the two are separated. The financial support, promotion, and preferment, of religion, which are forbidden by the Constitution, are clearly at issue here. For these and the reasons argued above, amici pray that this Court sustain the decision of the Court of Appeals for the Sixth Circuit and use this opportunity to enunciate clear limits on the channeling of purported "child benefits" through sectarian educational institutions.

Respectfully submitted,

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